UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entegra Power Group LLC
Gila River Power, L.P.
Union Power Partners, L.P.

Docket No. EC07-37-000

ORDER AMENDING BLANKET AUTHORIZATION FOR DISPOSITION OF JURISDICTIONAL FACILITIES AND ACQUISITION OF SECURITIES

(Issued March 5, 2007)

1. Entegra Power Group LLC (Entegra), Gila River Power, L.P. (Gila River), and Union Power Partners, L.P. (Union Power) (collectively, Applicants) request[1] that the Commission amend the conditions imposed under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)[2] in an order granting blanket authorization to engage in certain transactions.[3] Applicants request revision of the bar under the blanket authorization against acquisitions of Entegra Class A Units, where the acquiring entity owns five percent or more of the voting interests in any public utility that has interests in any generating facilities or that *otherwise engages in jurisdictional activities* within the control areas in which the generating facilities of Gila River and Union Power (collectively, Project Companies) are located. Applicants ask that the bar not apply to a power marketer affiliate that does not own or control generation (Proposed Modification). Applicants ask to have the revised blanket authorization apply for two years following the issuance of the order. The jurisdictional facilities are interconnection facilities, market-based rate tariffs, wholesale power sales contracts, and related books and records associated with generating facilities owned by the Project Companies.

[1] Filed on December 19, 2006, as clarified on January 29, 2007.

[2] 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAct 2005).

[3] *Entegra Power Group, LLC*, 115 FERC ¶ 62,038 (2006) (*Original Blanket Authorization Order*).

2. The Commission has reviewed the Proposed Modification under its Merger Policy Statement and Order Nos. 669, 669-A, and 669-B.[4] We will authorize the Proposed Modification, with an alteration, as discussed below. We find that transactions under the altered Proposed Modification will be consistent with the public interest and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

I. Background

A. Description of Applicants

3. Entegra identifies itself as a special purpose vehicle through which a group of lender-owners (Entegra Members) holds ownership interests in the Project Companies. Entegra states that it has two classes of ownership interests: Class A Unit holders are active investors with full voting rights, while Class B Unit holders are passive investors with few voting rights. According to Entegra, each of the current Entegra Members is a bank, institutional investor, financial institution, investment company, or related entity that is not primarily engaged in energy-related business activities. Because of its ownership interests in the Project Companies, Entegra states that it is a holding company, as defined under EPAct 2005.[5]

4. Entegra asserts that the Project Companies are wholly-owned subsidiaries of Entegra. Union Power owns and operates a 2,200 megawatt (MW) natural gas-fired, combined-cycle generating facility in Arkansas (Union Power Facility) that is interconnected with the transmission system of Entergy Arkansas, Inc., an operating company of Entergy Corporation (Entergy). Union Power sells wholesale power within the Entergy control area at market-based rates. Entegra also has a wholly-owned subsidiary, Trans-Union Interstate Pipeline, L.P., that owns a 42-mile interstate natural

[4] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001); *see also Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (2006) (Order No. 669 Series).

[5] EPAct 2005 § 1262(8)(A), 119 Stat. 972, *to be codified at* 42 U.S.C. § 16451.

gas pipeline that delivers gas to the Union Power Facility. Gila River owns and operates a 2,200 MW natural gas-fired combined-cycle generating facility in Arizona that is interconnected to the transmission system of Arizona Public Service Company (APS). Gila River sells wholesale power at market-based rates in the APS/Salt River Project (APS/SRP) control area, within the Western Electricity Coordinating Council region.

B. Prior Orders

5. The *Original Blanket Authorization Order* granted blanket authorization under section 203(a)(1) for a two-year period for future acquisitions and transfers of Entegra Class A Units by current and future Entegra members to an acquiring party that: (1) is a financial institution or related entity that is not primarily engaged in energy-related activities and is not affiliated with a traditional utility with captive customers; (2) does not individually, or collectively with affiliates, own five percent or more of the voting interests in any public utility that has interests in any generating facilities or *engages in jurisdictional activities* within the Entergy and APS/SRP control areas; and (3) will hold 20 percent or less of the Entegra Class A Units. Blanket authorization was also granted under section 203(a)(2) for a two-year period for future transfers of Entegra Class A Units in the secondary market to any holding company in a holding company system that includes a transmitting utility or an electric utility, provided the acquiring party meets the same three conditions. In addition, the Commission granted blanket authorization for transfers of Entegra Class A Units from future Entegra Members to direct or indirect wholly-owned subsidiaries of the ultimate corporate parent of each such future Entegra Member. Finally, the *Original Blanket Authorization Order* specified reporting requirements.

6. The Commission later broadened that blanket authorization to include two specific companies, Morgan Stanley & Co. Incorporated (Morgan Stanley) and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch).[6] These companies did not qualify for the blanket authorization in the *Original Blanket Authorization Order* because they owned power marketers that operated in the relevant control areas. However, these power marketers neither owned nor controlled generation. Nor did they own, control, or operate any electric transmission in the relevant control areas. Therefore, in the *Second Blanket Authorization Order*, the Commission found that "…the affiliation of Morgan Stanley and Merrill Lynch with such power marketers, as identified in the application, does not pose competitive concerns and we will not interpret the restriction of less than

[6] *Entegra Power Group LLC*, 117 FERC ¶ 61,085 (2006) (*Second Blanket Authorization Order*).

five percent of a public utility that engages in jurisdictional activities, as stated in the [*Original*] *Blanket Authorization Order*, to apply to their affiliation with such power marketers."[7]

C. Proposed Modification

7. Applicants request that the Commission clarify that the finding in the *Second Blanket Authorization Order* also applies to all other future or current owners of Entegra that otherwise meet the criteria in the *Original Blanket Authorization Order*.[8] Applicants argue that there is no reason that only Morgan Stanley and Merrill Lynch should receive the benefit of broader blanket authority. They contend that the authority granted in the *Second Blanket Authorization Order* should be available to all current and potential investors in Entegra that otherwise meet the criteria in the *Original Blanket Authorization Order*. Applicants assert that not granting blanket authorization to these entities would unnecessarily and unfairly discriminate against current and potential investors in Entegra who were not parties to the *Original Blanket Authorization Order*. They say that granting this request will provide the flexibility needed to permit transfers of Entegra equity to occur without the delay of a case-specific regulatory authorization. Applicants argue that this will meet investor needs and allow efficient use of Commission resources where there are no market power issues.

8. Applicants also argue that the Proposed Modification is consistent with the Commission's position that a power marketer who buys and sells power without ownership or control of physical assets has no market power.

II. Notice and Responsive Pleadings

9. Notice of the filing was published in the *Federal Register*, 72 Fed Reg. 339 (2007), with interventions, comments, or protests due on or before January 9, 2007. None were received.

III. Discussion

A. Standard of Review

10. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction "will be consistent with the public interest."[9]

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[7] *Id.* P 20.

[8] The Applicants suggested specific language. In a letter dated January, 29, 2007, Applicants proposed several other ways the Commission could satisfy their request.

[9] 16 U.S.C. § 824b (2000).

The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[10] In addition, EPAct 2005 amended section 203 to specifically require that the Commission also determine that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.[11] As discussed below, we will broaden the blanket authority because doing so meets the statutory standards.

B. Proposed Modification

1. Effect on Competition

11. Applicants argue that the Proposed Modification will not adversely affect competition. They argue that transactions under the Proposed Modification will not raise any horizontal market power issues for the same reasons stated in the *Second Blanket Authorization Order*.

12. Applicants also note that the Commission granted a similar application by Morgan Stanley in its October 26, 2006 Order conditionally authorizing disposition of jurisdictional facilities and acquisition of securities. Morgan Stanley did not qualify under the existing blanket authorization to acquire EBG Holdings, LLC securities because Morgan Stanley was affiliated with a power marketer that operated in, but did not own or control any generation in, the relevant region.[12] The Commission noted that without control of capacity, competition in wholesale energy markets cannot be harmed.[13] Accordingly, in the October 26 Order, the Commission found that "…the affiliation of Morgan Stanley with such power marketers, as identified in the application, [did] not pose competitive concerns and [declined to] interpret the restriction of less than

[10] *See supra* note 4.

[11] EPAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

[12] *Morgan Stanley & Company, Inc.*, 117 FERC ¶ 61,111, at P 7 (2006) (October 26 Order). Further, the power marketer also did not own or control transmission facilities.

[13] Citing *Duke Energy Corp.*, 113 FERC ¶ 61,297 at P 15 (2005).

five percent of a public utility that engages in jurisdictional activities, as stated in the [*Original*] *Blanket Authorization Order*, to apply to its affiliation with such power marketers."[14]

13. Applicants also argue that the Proposed Modification would still restrict affiliation with entities that have an interest in generation in the relevant control areas. A proposed future owner of Entegra securities that has an affiliate that owns or controls generation in the relevant market would not be able to qualify for blanket authorization.

14. In addition, Applicants argue that the Proposed Modification does not raise any vertical market power issues. Applicants state that the Proposed Modification would still restrict the ownership of, or affiliation with, traditional public utilities with captive customers. Applicants argue that, because this restriction includes public utilities that own transmission, there are no vertical market power issues under the Proposed Modification.

15. The Commission finds, as we did in the orders described above, that an acquiring firm's affiliation with a power marketer that does not own or control generation or transmission facilities in the relevant geographic area does not present competitive concerns. This applies to any acquiring firm that meets the other requirements in the *Original Blanket Authorization Order*.

16. However, we will not adopt Applicants' various proposals for re-wording the blanket authorization. In both the *Second Blanket Authorization Order* and the October 26 Order, the fact that the power marketers did not own or control any transmission in the relevant geographic region was a factor in the determination that the transactions proposed did not present any vertical market power issues. Applicants' proposed language would not prevent ownership of more than five percent of the voting interests in a power marketer that does own or control transmission within the Entergy and APS/SRP control areas, so long as that transmission does not involve affiliation with a traditional public utility with captive customers. Applicants state that there are no vertical market power issues because the Proposed Modification would restrict the ownership of, or affiliation with, traditional public utilities with captive customers and public utilities that own transmission. However, they did not provide any evidence that vertical market power issues are absent when an affiliated power marketer owns, controls, or is affiliated with transmission in the relevant geographic market but is not affiliated with a traditional public utility with captive customers.

17. To ensure that no market power issues are raised by a power marketer's ownership or control of transmission, we add the phrase "or transmission facilities" to one of the Applicants' proposed alternative language changes. That condition will now read "does

[14] October 26 Order, 117 FERC ¶ 61,111 at P 27.

not individually or collectively with affiliates own five percent or more of the voting interests in any public utility that has interests in any generating facilities or that engages in jurisdictional activities within the Entergy and APS/SRP control areas, provided that such restriction on jurisdictional activities does not apply to a power marketing affiliate that does not own or control generation or transmission facilities." This will ensure that transactions under the blanket authorization will not affect competition.

2. Effect on Rates

18. Applicants argue that transactions covered by the blanket authorization requested under the Proposed Modification will not have an adverse effect on rates. They state that all sales of power by the Project Companies will continue to be made at market-based rates as previously authorized by the Commission. In addition, Applicants state that Project Companies do not provide any transmission service for others, so no jurisdictional transmission rates are affected.

19. We find that transactions under the blanket authorization we are issuing will not adversely affect rates.

3. Effect on Regulation

20. Applicants contend that the Proposed Modification will not diminish Commission regulatory authority. In addition, Applicants argue that because the Proposed Modification will not result in a merger of public utilities, and because all sales from the Project Companies will continue to be at wholesale, the Proposed Modification will not have an adverse effect on state commission regulation.

21. We find that transactions under the blanket authorization issued here will not adversely affect regulation.

4. Cross-subsidization

22. Applicants argue that dispositions or acquisitions of interests in Entegra under the Proposed Modification cannot result in cross-subsidization now or in the future because Entegra, its current owners, entities presently authorized to acquire interests in Entegra in the future, and the Entegra Owners are not traditional public utilities that have captive customers or that own or provide transmission service over jurisdictional facilities. Applicants note that under the Proposed Modification, the acquiring party will not be a traditional public utility with captive customers, and will not be affiliated with a traditional public utility with captive customers.

23. Applicants state that because they are not traditional public utilities and because they do not have captive customers, they do not provide information on existing pledges and/or encumbrances of utility assets. In addition, Applicants state that the Proposed Modification does not violate Order No. 669-A, resulting in: (A) any transfer of facilities

between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (B) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (C) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (D) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.[15]

24. We find that Applicants have provided adequate assurance that transactions under the modified blanket authorization will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

C. Authorization Period

25. Applicants request permission to make transfers pursuant to the clarified and amended criteria discussed above for a two-year period following the issuance of this order. Applicants, in effect, ask the Commission to grant an extension in time of the *Original Blanket Authorization Order*. Applicants have provided no justification for a two-year extension of the blanket authorization. Thus, we will deny the request for permission to make transfers under the criteria as amended here for a two-year period following the issuance of this order. Applicants have permission to make transfers pursuant to the criteria as amended here as stated in the *Original Blanket Authorization Order*, effective until April 10, 2008.

The Commission orders:

(A) Applicants' proposed transactions under the Proposed Modification, with the alteration as discussed in the body of this order, are authorized, effective until April 10, 2008, as stated in the *Original Blanket Authorization Order*, subject to the conditions in the *Original Blanket Authorization Order*.

[15] Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (2006).

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.

(F) Applicants shall notify the Commission of transactions consummated under this order in accordance with the notification requirements of the *Original Blanket Authorization Order*.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.